

EXHIBIT 10

In The Matter Of:

MICROSOFT CORPORATION

v.

***MOTOROLA, INC., MOTOROLA MOBILITY LLC, and
GENERAL INSTRUMENT CORPORATION***

BRADLEY S. KELLER - Vol. 1 - REVISED

June 24, 2013

***CONFIDENTIAL
SUBJECT TO THE PROTECTIVE ORDER***

MERRILL CORPORATION

LegalLink, Inc.

135 Main Street
4th Floor
San Francisco, CA 94105
Phone: 415.357.4300
Fax: 415.357.4301

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1 Q. Paragraph 4.

2 A. Yes.

3 Q. On Page 2. It continues on to Page 3.

4 You state that you've been asked by counsel "to
5 analyze the law firm invoices on which Mr. Menenberg
6 relied in calculating the amount of attorneys' fees
7 and litigation costs allegedly incurred by Microsoft
8 as a result of defending against Motorola's claims of
9 infringement of its 802.11 and H.264 SEPs"; is that
10 correct?

11 A. That is correct.

12 Q. Okay.

13 Mr. Keller, are you an expert in
14 accounting?

15 A. No, I'm not.

16 Q. Are you an expert on injunctions?

17 A. I have had more injunctions than most --
18 I've dealt with more injunctions as a litigator than
19 most people do, so I'm not sure if that qualifies me
20 as an expert or someone that has a large degree of
21 concentration in their practice.

22 There are certain restrictions on
23 attorneys in Washington characterizing themselves as
24 being an expert in a particular area, so I would say I
25 have a high degree of concentration and background and

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1 experience in injunctions.

2 Q. Have you ever provided expert testimony
3 or rendered any opinions regarding injunctive relief?

4 A. Only in connection with attorney
5 declarations in support of or in opposition to
6 injunctions that I've been involved in litigating.

7 Q. Those are matters that you've been
8 representing one of the parties involved?

9 A. Correct.

10 Q. But nothing like this current situation,
11 where you've been retained by someone to opine on the
12 propriety of an injunction or type of injunctive
13 relief?

14 A. I don't view myself as really opining
15 here today on the propriety of an injunction as
16 distinguished from issues involving fees that were
17 incurred in con -- in conjunction with the request for
18 an injunction.

19 Q. Understood.

20 Mr. Keller, are you an expert on
21 standard-essential patents?

22 A. From a substantive patent law standpoint,
23 no.

24 Q. You don't have a technical degree?

25 A. No, I do not.

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1 Q. Are you admitted to the Patent Bar?

2 A. No.

3 Q. Do you consider yourself an expert in
4 matters pending before the International Trade
5 Commission, the ITC?

6 A. No.

7 Q. Have you ever handled a case pending
8 before the ITC?

9 A. I've been involved in cases that have had
10 ancillary proceedings in front of the ITC, but in
11 terms of my own actual appearance in front of the ITC,
12 the answer is no.

13 Q. Okay.

14 Have you ever previously opined regarding
15 the reasonableness of attorneys' fees incurred in
16 connection with an ITC investigation?

17 A. I've given opinions in cases that had
18 ancillary proceedings in front of the ITC, and I
19 believe some of the fees involved ITC work, yes.

20 Q. And which matter was that?

21 A. I'm not recalling the names.

22 Q. Do you remember what opinion you rendered
23 regarding any fees incurred before the ITC?

24 A. It was just general opinions regarding
25 the level of attorneys' fees that had been incurred by

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1 practice of law and being managing partner of your
2 film?

3 A. I'd say it's largely being an active
4 participant in the Seattle and the Pacific Northwest
5 legal community for over 30 years. I run a law firm
6 of 10 lawyers, and we need to keep abreast of what our
7 competitor's doing, trying to stay within what's
8 permissible and what's not permissible. I have
9 numerous conversations with my counterparts at other
10 law firms.

11 The nature of my practice also provides
12 me visibility into the billing rates and practices of
13 virtually all the other large law firms here in the
14 Pacific Northwest.

15 Those would be the primary sources that I
16 would draw on for my own views as to what the rates
17 are for attorneys.

18 Q. And, now, the rates are for attorneys
19 located where?

20 A. Largely in the Sea -- greater Seattle and
21 Pacific Northwest area.

22 Q. Okay.

23 In connection with rendering your
24 opinions in this matter and preparing Exhibit 1, did
25 you talk to anyone about fees incurred in large patent

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1 cases or investigations pending before the ITC?

2 A. No one that I was specifically consulting
3 with regarding this engagement. I have familiarity
4 with what patent lawyers charge here in the Northwest
5 just from my own practice, having been active in a
6 number of patent cases.

7 Q. Now, Mr. Keller, you mentioned in
8 addition to reviewing the documents listed on
9 Attachment 3, with the couple of additions that you
10 have told us about, that you also had some
11 conversations with certain attorneys to aid you in
12 preparing your report. Who did you have conversations
13 with?

14 A. Just Mr. Palumbo and Ms. Roberts.

15 Q. Okay.

16 Anyone else?

17 A. That's all I recall.

18 Q. Did you speak with anyone from Motorola?

19 A. You mean either an in-house attorney or a
20 businessperson?

21 Q. Yes, either one.

22 A. A real person?

23 Q. A real --

24 A. The answer is no.

25 Q. Did you speak with anyone from

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1 Ropes & Gray?

2 A. Yes. There were two -- there were two
3 gentlemen who had been involved in the ITC proceeding
4 that provided me with a very high-altitude overview.

5 Q. Do you remember their names?

6 A. I do not.

7 Q. When did you speak with them?

8 A. Within the last week.

9 Q. So this is after you prepared your
10 report?

11 A. Yes.

12 Q. In preparing your report, Exhibit 1, I
13 take it you didn't rely on conversations with or
14 information received from Ropes & Gray?

15 A. No. As I mentioned earlier, I had looked
16 at the docket index for sort of a very, very
17 high-altitude overview of it, and I really wanted to
18 just speak with someone who had a little more boots on
19 the ground to see if some of the very high-altitude
20 takeaway impressions I had about what was at issue at
21 various points in time was correct.

22 Q. You stated that you did not speak with
23 anyone either in-house counsel or businessperson from
24 Motorola in connection with your engagement in this
25 matter. Just to make sure we've covered everything,

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1 did you speak with any in-house counsel or
2 businesspeople from Google in connection with your
3 work in this matter?

4 A. No.

5 Q. Other than Ms. Roberts, did you speak
6 with anyone else from Quinn Emanuel regarding your
7 engagement in this matter?

8 A. I don't believe so.

9 Q. And other than Mr. Palumbo, did you speak
10 with anyone from Summit Law Group in connection with
11 your engagement in this matter?

12 A. No attorneys, no.

13 Q. Okay.

14 Mr. Keller, in connection with your
15 engagement in this matter, is it correct that you did
16 not review the invoices for fees and expenses incurred
17 by Calfo Harrigan?

18 A. That is correct.

19 Q. Okay.

20 Formally known as Danielson --

21 A. Still correct.

22 Q. Right. Okay.

23 So, Mr. Keller, you're not rendering any
24 opinion regarding the Calfo Harrigan fees for which
25 Microsoft is seeking reimbursement?

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1 A. Yes.

2 Q. And you're not rendering any opinion
3 regarding the fees charged by the Boehmert firm to
4 Microsoft?

5 A. That is correct.

6 Q. So the only fees on which you are
7 rendering an opinion were the Sidley Austin fees for
8 which Microsoft is seeking reimbursement?

9 A. That is correct.

10 Q. Mr. Keller, were you asked to render an
11 opinion on any other aspect of Microsoft's damages
12 claim in this case?

13 A. I have some opinions, but whether or not
14 it was appropriate for me to provide them was a
15 question mark, and so I don't -- you know, they're
16 referred to in the report in the initial paragraph,
17 and really has to do with the fundamental issue as to
18 whether or not attorneys' fees can be claimed in the
19 first place as an item of compensable damages, and,
20 you know, I have some views about that that I
21 volunteered rather than being asked. I don't know
22 what the status of those will end up being.

23 Q. You testified that you had some opinions,
24 but there's a question as to whether or not it was
25 appropriate for you to provide them. What do you mean

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1 A. No.

2 Q. Did that -- assuming that Microsoft had
3 offered to pay Motorola a RAND royalty, would that
4 affect your opinion regarding causation?

5 A. My opinion regarding causation is based
6 strictly on the timing of it, and that there would be
7 no reason for Motorola to have commenced those
8 proceedings absent Microsoft having initially shot
9 first on the 1823. It doesn't have anything to do
10 with dollars and cents.

11 Q. What's the basis for that statement that
12 there would have been no reason for Motorola to have
13 filed the lawsuit absent Microsoft having first filed
14 a lawsuit on different patents?

15 A. Because -- my understanding of what the
16 claims were in the 1823 case, it seemed to me, as an
17 outsider, without any insights into the thinking of
18 the various businesspeople and people who were
19 determining the strategy -- I can't discern a valid
20 reason for why Motorola would have commenced the cases
21 at that time, if it hadn't first been sued by
22 Microsoft.

23 Q. But you didn't talk to anyone at Motorola
24 about that, did you?

25 A. Absolutely not.

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1 Motorola to agree from refraining to enforce any
2 injunctive relief that it may be able to obtain and
3 Motorola refused to do that, would that fact impact
4 the opinions that you're rendering in this case
5 regarding reasonableness of fees and causation?

6 A. I wouldn't render an opinion one way or
7 the other based on that fact. I would want to know
8 all of the -- all of the circumstances of whatever
9 communication you're referring to and whatever
10 particular injunctions it related to.

11 And at the end of the day I still don't
12 think it would alter any -- alter any of my opinions
13 or conclusions.

14 Q. Why not?

15 A. Because, again, I'm not dealing with the
16 substance of the schoolyard fight. I'm dealing with
17 the tabs that came with them. The bill.

18 Q. Right. In Paragraph 5a you're talking
19 about causation, so why does the fact that an offer
20 was made to void enforcing certain types of relief,
21 types of relief that are the subject of present
22 lawsuit -- why would that not be relevant to your
23 opinion on causation?

24 A. Because --

25 MR. PALUMBO: Objection. Argumentative.

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1 A. Yes.

2 Q. Mr. Keller, are you familiar with
3 Rule 1.5, the American Bar Association Model Rules of
4 Professional Conduct?

5 A. I'm much more familiar with the par --
6 the corollary of 1.5, under the Washington Rules of
7 Professional Conduct. And if you ask me if I'm aware
8 of what the differences are between the Model Rules
9 and the Washington Rules, the answer would be no. I
10 don't even know that there are any differences.

11 Q. Okay.

12 Did you consider either the ABA Model
13 Rule or the Washington Rule in preparing your report
14 in this case?

15 A. Only from a secondary standpoint. In
16 effect all of the RPC 1.5 -- I think it's 82 --
17 factors are blended into and reflected in what is the
18 range of rates that you will see for a particular type
19 of practice.

20 Q. Mm-hmm.

21 Let's go ahead and mark this.

22 (Deposition Exhibit 3 was marked
23 for identification.)

24 (Discussion off the record.)

25 Q. BY MS. ROBBINS: Mr. Keller, I've handed

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1 A. Yes.

2 Q. Okay.

3 What did do you to consider this factor?

4 A. Subpart (1), along with many of the other
5 subparts, is part of what comprises the reasonable
6 range for attorneys doing this type of work for our
7 community.

8 Q. With respect to the ITC 752
9 investigation, other than reading the docket and the
10 initial determination rendered by the ALJ, did you do
11 anything else to educate yourself regarding that
12 investigation before preparing your report?

13 A. I did -- I wanted to satisfy myself that
14 any attorney could participate in a particular matter
15 in front of the ITC. And so I did look at the --
16 online to look at what the rules for practice were, to
17 see if they had separate admission criteria, separate
18 bar, that kind of thing, and -- because my impression
19 before had been -- before this is that there was no
20 such requirement, and that was generally confirmed.

21 Q. Did you sign on to the protective order
22 in ITC 752?

23 A. The protective order in ITC 752?

24 I signed on to the protective order in
25 the 1823 case.

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1 Q. Right.

2 A. I don't know if that hooks into anything
3 else, but I did not sign anything separate regarding
4 752.

5 Q. So you didn't have any access to the
6 confidential information that was filed before the
7 ITC?

8 A. Correct.

9 Q. The review of any of the ID or the
10 docket, that was all done --

11 A. Correct.

12 Q. The review you did was what any person
13 could do by logging onto the ITC Web site? You looked
14 at the publicly available version of the docket and
15 the initial determination?

16 A. Correct.

17 Q. Any pleadings from ITC 752 that you
18 recall reviewing other than the ALJ's initial
19 determination?

20 A. I'm pausing only because I'm seeing in my
21 mind's eye a pretrial order and trial briefs, but
22 I'm -- I'm leaning towards those were in the 1823
23 matter, not the 752 ITC proceeding.

24 Q. If it helps jog your memory, the
25 prehearing briefs in the ITC are hundreds of pages

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1 long.

2 Not that that narrows down the universe
3 in this case.

4 Don't remember?

5 A. No.

6 Q. Okay.

7 A. I have no specific recollection of
8 reviewing anything else.

9 Q. Mr. Keller, you mentioned that you --
10 you've looked to see if there were any separate
11 admission criteria for an attorney to practice before
12 the ITC. Where did you look to determine that?

13 A. There were some general rules that -- I
14 can't remember what the number of it was, but it was,
15 you know, what -- what do you have to do in front of
16 the -- to appear in front of the ITC. I wanted to
17 satisfy myself that, you know, somebody who is a --
18 somebody like myself could just do it.

19 Q. Okay.

20 A. And that was my impression before going
21 into this, and I wanted to confirm it.

22 Q. Is it your opinion that Microsoft should
23 have used counsel who had never before appeared before
24 the ITC?

25 A. It's -- it's my opinion that Microsoft

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1 proceedings a firm that had experience in handling
2 matters before the ITC?

3 A. No, they were firms that had experience
4 in substantive patent litigation.

5 Q. Did they have experience before the ITC?

6 A. Not that I'm aware of. That was
7 certainly not their calling card. Calling card was
8 as -- as experienced patent folks.

9 Q. And which firms were those?

10 A. Oh, the one that comes to mind that I
11 believe we had a significant -- you know, relatively
12 significant ITC proceeding involved an Oklahoma
13 company. The law firm was McAfee & Taft, out of
14 Oklahoma City.

15 Q. Did you speak to any ITC practitioners
16 about practice of the ITC?

17 A. The fellas from Ropes & Gray, who I think
18 were more general patent litigators with significant
19 ITC experience. I don't -- I don't really think of it
20 as ITC practitioner as a separate group. To me it's
21 patent -- patent litigators and trial lawyers.

22 Q. And those conversations, again, with
23 attorneys from Ropes & Gray happened within the last
24 week?

25 A. Yes.

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1 Q. Prior to submitting your report, did you
2 speak to any Motorola's counsel about ITC 752?

3 A. I'm sure it was covered in my discussions
4 with Ms. Roberts and Mr. Palumbo, but in terms of
5 getting granular, no. I didn't really get granular
6 with the Ropes & Gray folks, either.

7 Q. To your knowledge, did either Mr. Palumbo
8 or Ms. Roberts play any role in the ITC 752
9 investigation?

10 A. I don't know one way or the other.

11 Q. What about -- you indicated you're
12 familiar with the fact that Motorola filed lawsuit in
13 the Western District of Wisconsin, correct?

14 A. I saw that in -- I think it was in -- in
15 Judge Robart's summary judgment ruling, early on he
16 says that the case had a very complicated procedural
17 history.

18 Q. Mm-hmm.

19 A. And he refers back to an earlier order.
20 And I did go read that earlier order, and
21 I thought to myself, Do I need to diagram out this
22 complicated procedural history of all these cases?
23 And I came to the conclusion I didn't.

24 Q. Okay.

25 A. Rightly or wrongly.

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1 So -- but the answer is, yes, I know at
2 some point there was a case in the Western District of
3 Wisconsin that got transferred over to the Western
4 District of Washington.

5 Q. Okay.

6 Did you do anything to educate yourself
7 regarding that litigation that was filed in the
8 Western District of Wisconsin?

9 A. The details of it, no.

10 Q. Did you ever review the complaint?

11 A. No.

12 Q. Did you ever review any of the patents?

13 A. The patents themselves? Actually read
14 the patents?

15 Q. Yeah.

16 A. No.

17 Q. Did you -- did you review any of the
18 pleadings from the Western District of Wisconsin?

19 A. No.

20 Q. Did you speak with anyone about the
21 Western District of Wisconsin litigation?

22 A. Other than to generally confirm the
23 high-altitude procedural overview that I gleaned from
24 Judge Robart's order, no.

25 Q. Did you discuss the Wisconsin litigation

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1 other than Seattle area?

2 A. Well, I did -- I did consider other
3 locales, but I felt that they needed to be kept in
4 their proper perspective.

5 Q. Which other locales did you consider?

6 A. I felt that -- that's why I say the
7 needs -- reasonable needs of Microsoft, what was
8 necessary, could have been largely fulfilled by
9 utilizing attorneys from the Seattle area and the
10 Pacific Northwest.

11 Q. Which other locales did you consider?

12 A. I didn't really consider any other
13 specific locales other than the reality I knew of here
14 was that there were members of the Sidley team from
15 certain other locales, so I looked at those for
16 purposes of comparing what their counterparts here in
17 the Pacific Northwest would have charged in some
18 instances.

19 Q. Okay.

20 Factor No. 4, "the amount involved and
21 the results obtained." Mr. Keller, did you consider
22 that factor in rendering your opinion?

23 A. Yes.

24 Q. How did you consider that factor?

25 A. That this was a substantial case, that

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1 the ITC 752 proceedings is?

2 A. Not other than we are at a period of time
3 post the ALJ's decision, post remand on one non-SEP.

4 Q. Are you familiar, Mr. Keller, with the
5 summary judgment proceedings relating to the '374,
6 '375 and '376 patents, which were originally asserted
7 in the Western District of Wisconsin?

8 And I should clarify. The summary
9 judgment proceedings before Judge Robart in the
10 Western District of Washington.

11 A. Not to any degree of detail.

12 Q. Do you have any understanding of -- that
13 there were such proceedings, that there was summary
14 judgment motion and ruling on those patents?

15 A. Summary judgment regarding something
16 other than claim construction but summary judgment
17 dealing with what?

18 Q. Validity and other matters on those
19 patents.

20 A. I could tell from reviewing the billings
21 that there had been issues involving invalidity
22 contentions regarding the -- I'll get the numbers
23 wrong. '374 --

24 Q. '374, '75 and '76.

25 To clarify, they're H.264-related

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1 the fact that there were the proceedings is -- and the
2 fees that were incurred in connection with those
3 proceedings are part of my opinions.

4 We've been going at it for about an hour
5 and a half.

6 Q. We can take a break now. Is that fine
7 with you, Ralph?

8 THE VIDEOGRAPHER: We're going off the
9 record. The time is 10:26 a.m.

10 (Short recess.)

11 THE VIDEOGRAPHER: This is the beginning
12 of Disk No. 2 in the deposition of Brad Keller. We
13 are back on the record. The time is 10:39 a.m.

14 Q. BY MS. ROBBINS: Okay. Mr. Keller, when
15 we broke, we were looking at Exhibit No. 3, and I
16 think we're now going to be moving on to Factor No. 5
17 listed there, "the time limitations imposed by the
18 client or the" -- "or by the circumstances."

19 Are you familiar with that factor, either
20 from the ABA Model Rule or the Washington Rule?

21 A. Yes, I am.

22 Q. Did you consider this factor at all in
23 rendering your opinion or preparing your report in
24 this matter?

25 A. I considered it only in the sense that it

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1 did not strike me as being a particularly germane
2 factor to these fee issues.

3 Q. Okay.

4 Mr. Keller, in conjunction with your
5 review of the ITC docket, did you review any of the
6 scheduling orders in the ITC 752 investigation?

7 A. The actual orders themselves, no.

8 Q. Are you familiar at all with the schedule
9 and the various deadlines that were set in that case
10 preparing for the original hearing?

11 A. I knew that -- I knew generally when the
12 first evidentiary hearing was going to be happening,
13 and I knew from the review of materials approximately
14 how much time there was going to be between the remand
15 and the subsequent hearing in front of the ALJ, but
16 other than that, no.

17 Q. Do you have an understanding of how much
18 time was permitted for discovery in the case before
19 the initial hearing?

20 A. Not with -- to any degree of precision.
21 I knew that -- I knew that there was discovery, I knew
22 that there were depositions, and that there was a time
23 for that prior -- prior to the first hearing.

24 Q. Are you aware that the first hearing was
25 originally scheduled approximately nine months after

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1 the case was filed?

2 A. I didn't know specifically nine months,
3 but that's not inconsistent with what I, you know,
4 would have expected initially.

5 Q. Did you discuss at all with any of
6 Motorola's counsel the schedules in the various cases?

7 A. Not to any degree of specificity. You
8 know, again, I had a big-picture timeline. I wanted
9 to -- I wanted to keep in focus also what years most
10 of the fees that were at issue were being incurred.

11 Q. Mm-hmm.

12 A. So when you juxtapose that with certain
13 milestones that I knew that had occurred at certain
14 junctures, I had a general understanding of the
15 timeline, but not to any degree of specificity.

16 I couldn't tell you when the discovery
17 cutoff date was, either in this 1823 case or in the
18 57 -- 752 case. I transpose digits all the time.
19 You'll have to excuse me.

20 Q. All right.

21 Let's take a look now at Factor No. 6 on
22 Exhibit 3, "the nature and length of the professional
23 relationship with the client."

24 Did you consider Sidley's relationship
25 with Microsoft at all in rendering your opinion?

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1 matter, you didn't make any attempt to determine rates
2 charged by topflight partner-level litigators or
3 associates either with or without technical degrees in
4 Chicago, did you?

5 A. That's correct.

6 Q. And you didn't make any effort to
7 determine rates charged by either partners or
8 associates with or without technical degrees in
9 Washington, D.C.?

10 A. That's correct, because my working
11 assumption is that the ITC proceeding could have been
12 predominantly handled by attorneys here, in our
13 community.

14 Q. And you made no attempt to determine the
15 standard rates charged by partners or associates in
16 Dallas?

17 A. Well, there was only one lawyer that I
18 was looking at from Dallas, and he was neither fish
19 nor fowl; he was of counsel --

20 Q. Right.

21 A. -- as I understood it. And I did not
22 compare how his Dallas rate would compare to his
23 counterpart in Dallas, which I think is what you're
24 asking me.

25 Q. Yes.

1 A. Because what either Microsoft or Motorola
2 chooses to do regarding who it asks to get up on their
3 feet and speak for them is not important to me.
4 What's important to me is what's necessary.

5 Q. Were any of the lawyers who appeared in
6 the I -- in the ITC proceeding and participated in
7 those proceedings based in Seattle?

8 A. That actually had speaking roles at the
9 evidentiary hearing?

10 I don't know one way or the other.

11 Q. Okay.

12 A. I haven't reviewed the transcript from
13 the evidentiary hearing, if there is a transcript.

14 Q. Do you know where the Ropes & Gray
15 attorneys who handled ITC 752 on behalf of Motorola
16 were based?

17 A. No, I don't.

18 Q. Did you ever ask?

19 A. No.

20 Q. Do you know what law firm Motorola used
21 in the Western District of Wisconsin case that was
22 eventually transferred to Seattle?

23 A. I did, but I don't remember.

24 Q. Okay.

25 Were those attorneys based in Seattle?

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1 A. No. It in effect I think sort of shows
2 that the client can use whoever they want and spend
3 whatever they want, but there's a difference between
4 that and, on the other hand, what's necessary.

5 Q. Paragraph 14 of your report, you state
6 that in Seattle the topflight partner-level litigators
7 range from 450 to \$600 per hour, in some unusual cases
8 \$625 per hour, and then you discuss rates that second-
9 or third-year associate in Seattle would not exceed
10 \$240 per hour, or if the person has a technical
11 background, \$255 per hour.

12 What is the source of that information in

13 Paragraph 14 of your report?

14 A. 33 years of practicing law in our
15 community and as part of my responsibilities of
16 practicing law and running a 10-person law firm,
17 needing to stay abreast of what my neighbors are
18 doing.

19 Q. Any other source of that information?

20 A. And the review of bills from other firms.

21 Q. Okay.

22 A. And I think --

23 Q. Anything else?

24 A. And I think one of the prior engagements
25 that I referenced was actually providing some

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1 information about a patent litigator.

2 Q. And which engagement was that? Let's
3 take a look.

4 I believe that's on Attachment 2 to your
5 report.

6 A. I believe the Malico case versus Cooler
7 Master.

8 Q. And that case do you believe involved a
9 patent?

10 A. I -- yes.

11 Q. Okay.

12 A. Although I don't think the case ever got
13 to the point where the substantive patent knowledge
14 became germane. I believe it was tossed on either
15 personal jurisdiction or venue was transferred, some
16 sort of a threshold issue.

17 Q. And in -- in that case you submitted a
18 declaration stating that a billing rate for an IP
19 litigator of -- in Seattle of \$575 an hour was
20 reasonable and within the customary charges of others
21 in Seattle with similar experience; is that correct?

22 A. I wouldn't phrase it that way. It was
23 for that particular person, who is one of the top
24 patent litigators in the city.

25 MS. ROBBINS: Why don't we go ahead and

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1 What's important to me is was it necessary for them to
2 incur the level of fees.

3 Q. Is it your opinion it was unreasonable
4 for Microsoft to engage Sidley Austin on these
5 matters?

6 MR. PALUMBO: Asked and answered.

7 THE WITNESS: Only in the sense that if
8 Microsoft had confined itself to what was necessary,
9 there was no need for it to go out of town for much of
10 the horsepower it sought to put on its legal team.
11 And in the sense that it was not necessary, it
12 resulted in an unreasonably high level of fees.

13 But I do not challenge its right to make
14 the choice to incur unnecessary fees if it wants to do
15 so. What I challenge is the ability to recover it
16 from somebody else.

17 Q. BY MS. ROBBINS: What counsel in Seattle
18 do you think Microsoft should have used for the
19 ITC 752 proceeding?

20 A. I'm not opining as to any particular
21 lawyer that it should have used. I would say that
22 there are many lawyers here that would have the
23 requisite skill set and level of skills to have either
24 led the charge or been all the positional players and
25 the bench players, even if -- even if it decided it

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1 wanted to have, you know, a, as in singular, local
2 D.C. lawyer.

3 It -- we're talking about -- you're
4 fielding a team. We're talking about the size of the
5 team and who the players are on the team, and the
6 overwhelming bulk of the players, in my view, could
7 have been capa -- those roles could have been more
8 than capably filled by a number of lawyers in our
9 community.

10 Q. As you sit here today you don't have any
11 particular firm or lawyer in mind?

12 A. There are many. Part of my opinion is
13 not telling Microsoft what specific individual or law
14 firm it should have hired, just -- part of my opinion
15 is just there are a number of very capable lawyers
16 with the bench to deal with something like this.

17 Q. If I told you that Motorola paid
18 attorneys' fees in excess of [REDACTED] and expenses
19 of approximately [REDACTED] in connection with the
20 lawsuits it brought against Microsoft, would that
21 alter your opinion --

22 A. Not at all, no.

23 Q. -- to Microsoft's fees?

24 A. Not at all, no.

25 Q. Why not?

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1 Q. Okay.

2 A. So your question was compare that number
3 to [REDACTED]

4 Q. [REDACTED].

5 A. [REDACTED]

6 Q. Ropes is higher?

7 A. Yeah.

8 Q. If I told you that Sidley had [REDACTED] hours
9 billed at rates of [REDACTED] per hour or higher and
10 Motorola's counsel had approximately [REDACTED] hours
11 billed in excess of [REDACTED] an hour, would you have a
12 basis to disagree with that?

13 A. I would have no basis to agree with it or
14 disagree with it. That sounds like a good exercise
15 for Mr. Menenberg. For which you can then pay him
16 \$550 an hour to do.

17 Q. You've paid Mr. Menenberg to do some work
18 for your firm, haven't you?

19 A. I don't believe I have ever hired
20 Mr. Menenberg. I've cross-examined him quite a few
21 times, but I don't know that I've ever used
22 Mr. Menenberg.

23 Q. Hasn't your firm?

24 A. My firm?

25 Q. I think -- isn't your firm current --

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1 15 -- in the 30 -- 15 to 30 percent higher than what
2 would have been required in our community, and looking
3 at it from the standpoint of figuring out how many
4 timekeepers are in here and the potential impact on
5 necessary legal fees because of the unwieldy and too
6 many folks, no.

7 Q. Were there any of the attorneys whose
8 billing rates you found to be in line with what you
9 would have expected be?

10 A. Clearly, a number of the partners fall
11 generally within the range of 450 to \$600, so it would
12 be tempting to say yes. But I'd have to also add that
13 in general, even within that range, looking at those
14 people and looking at their back -- you know, my
15 understanding of their background and experience, they
16 were in general 15 to 30 percent higher than what you
17 would pay here.

18 Q. And what about the associates?

19 A. Same thing.

20 Q. In Paragraph 16 of your report you state
21 that the Sidley billings reflect an excessive number
22 of timekeepers. Did you make any effort to compare
23 the number of Sidley timekeepers with the number of
24 timekeepers at Ropes & Gray, Steptoe & Johnson, Quinn
25 Emanuel?

1 A. I did not review the Quinn Emanuel or the
2 Ropes billings for the purposes of determining the
3 number of timekeepers in the brackets that I did so
4 for the Sidley billings.

5 Q. Did you ask Ropes & Gray or Quinn how
6 many lawyers they had on these -- staffed on these
7 matters?

8 A. No, because, again, I'm focusing on
9 what's necessary.

10 Q. Prior to rendering your opinion, did you
11 speak to any of Motorola's counsel to ask about what
12 was going on in the various cases that might have
13 required such ample staffing?

14 A. Only in the most -- indirectly and in a
15 most general way, by trying to familiarize myself
16 generally with what had happened over time, and then
17 comparing that to my own experience of, you know, is
18 this going to warrant close to a hundred and ninety
19 timekeepers over two and a half years? No. Over a
20 hundred and twenty five? No. Over 61 people billing
21 more than \$50,000? No.

22 Q. Are you aware that there were days where
23 there were as many as seven to eight depositions per
24 day?

25 A. Seven or eight substantive depositions --

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1 context, of reductions ranging from 10 to 30-plus
2 percent, and that I felt I couldn't go in and try and
3 be more precise because of the lack of granularity to
4 the billing records that I was dealing with.

5 Q. Have you made any effort to come up with
6 an alternative fee that you believe would be -- would
7 constitute a reasonable and necessary fee?

8 A. Not a number, no.

9 Bearing in mind that you're talking to
10 someone who's of the view that this is not a
11 compensable component of damages.

12 Q. And that is based on your legal opinion?

13 A. Yes.

14 Q. Mr. Keller, you're currently counsel in a
15 case where you're adverse to Microsoft; is that right?

16 A. I'm trying to think. Is it only one?
17 Yes, at least one.

18 Q. Okay.

19 And which case is that?

20 A. It's a patent case, REC Software.

21 Q. Okay.

22 And that case is pending before Judge
23 Robart?

24 A. Yes, it is. Hopefully be tried this
25 October.

1 A. I think all -- all the cases that we've
2 talked about were IP cases or trade secret, and I
3 think that is it.

4 That's all I can recall, but --

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5           Seems like there should be one or two
6  others.
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7 MS. ROBBINS: Why don't we take a
8 five-minute break, let me go over my notes and see if
9 there's any other exhibits, and I think you're looking
10 pretty good for your three o'clock.

11 THE VIDEOGRAPHER: We're going off the
12 record. The time is 2:10 p.m.

13 (Short recess.)

14 THE VIDEOGRAPHER: We are back on the
15 record. The time is 2:24 p.m.

16 Q. BY MS. ROBBINS: Mr. Keller, just to
17 clarify, have you ever retained Todd Menenberg from
18 Navigant Consulting as an expert witness?

19 A. Myself personally, no. I'm uncertain
20 about my partners, though.

21 I know that my partners have retained
22 Navigant.

23 Q. Okay.

24 Just to sum up some of your opinions
25 here. You have no opinion on the reasonableness or

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1 necessity of the fees incurred by Calfo Harrigan,
2 formerly Danielson firm?

3 A. I'm only pausing because of the necessary
4 part of it, because -- but I think the answer to your
5 question is that's correct, I do not have a -- I am
6 not giving any opinion that any portion of their fees
7 were not reasonable or that they were not necessary,
8 assuming fees are otherwise compensable consequential
9 damages.

10 Q. You've already expressed your legal
11 opinion that in your view they're not compensable,
12 correct?

13 A. Correct.

14 Q. And you're not rendering an opinion on
15 whether the fees Microsoft paid to Freshfields were
16 reasonable or necessary?

17 A. I have not -- I have not reviewed their
18 billings and would not be in a position to offer an
19 opinion one way or the other on that subject.

20 Q. On the fees charged by Freshfields,
21 correct?

22 A. I'm not in a position to have an opinion
23 one way or the other.

24 Q. And would the same be true with respect
25 to the fees charged by the Boehmert & Boehmert firm?